No. 14,077

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Appellee.

Reply Brief for Appellant Southern Pacific Company

JAMES C. DEZENDORF,
GEORGE B. CAMPBELL,
800 Pacific Building,
Portland 4, Oregon
JAMES E. LYONS,
CHARLES W. BURKETT, JR.,
65 Market Street,
San Francisco 5, California
Attorneys for Appellant Southern Pacific Company

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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I.

APPELLEE'S BRIEF RESTS ON A MISCONCEPTION OF THE POWERS AND DUTIES OF THE HEARING EXAMINER, THE INTERSTATE COMMERCE COMMISSION AND THE DISTRICT COURT

Appellee[1] in its brief makes frequent reference to statements made in the proposed report of the hearing Examiner, in the report and order of the Interstate Commerce

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1. Referred to herein as appellee and as Martin Brothers; appellant Interstate Commerce Commission and appellant Southern Pacific Company are generally referred to as "the Commission" and "Southern Pacific", respectively.

Commission, and in the opinion and judgment of the District Court. The ultimate determinations made in these three documents were the following:

1. The Examiner in his proposed report recommended that the Commission *should find* that during the complaint period Southern Pacific failed in its duty to provide and furnish transportation from the Martin Brothers' plant upon reasonable request, and failed in its duty to furnish adequate car service at that plant to a specified extent. The Examiner recommended that the Commission should further find that Martin Brothers had been damaged and was entitled to reparation.[2]

2. The Commission in its report found that Martin Brothers had failed to etsablish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice as alleged, in violation of Section 1 of the Interstate Commerce Act, in furnishing or not furnishing cars to Martin Brothers, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3. The Commission gave effect to these determinations by contemporaneously issuing an order "that the complaint in this proceeding be, and it is hereby, dismissed".

3. The District Court in its opinion and judgment determined as a matter of law that the Commission was required to find, on the record as made, that Southern

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2. These findings proposed by the Examiner were in response to the allegation in the complaint of the violation of Section 1 of the Interstate Commerce Act, which requires rail carriers to furnish rail cars "upon reasonable request". The Examiner's proposed report contained no recommendation that the Commission find that Southern Pacific had subjected Martin Brothers to any undue prejudice in contravention of Section 3 of the Act, as alleged in the complaint.

Pacific had violated Section 1 and Section 3 and that Martin Brothers was entitled to an award of reparation.

Appellee attempts to give a correlative status to these three determinations and emphasizes the alleged fact that the Examiner and the District Court "made the same findings and reached the same conclusions of law". This reflects a misconception by appellee of the powers and duties of the hearing Examiner, the Commission, and the District Court in the administrative process.

In demonstrating that misconception we shall consider first the relative functions and powers of the Commission and the District Court and then the significance of the Examiner's report.

A. The relative functions and powers of the Commission and the District Court

While this is an appeal from the judgment of a district court, that court, in entering such judgment, was acting only in the capacity of reviewing a report and order of the Interstate Commerce Commission. The sole evidence received by the District Court was the record made before the Commission, and even in reviewing that record the function of the District Court was not to provide a trial *de novo,* in any sense, of the issues determined by the Commission. The District Court's function was, rather, to determine, as a matter of law, whether the record made before the Commission contained substantial evidence to support the Commission's findings. Therefore, unlike most appeals from district courts to this court, there are no findings of fact of the trial judge to be given controlling weight. As the sole

determinations made by the trial judge in his function are matters of law, this court has the same power in considering and making those determinations as did the trial judge.

In apparent recognition that the power of the District Court was limited to determining matters of law, appellee reiterates throughout its brief the contention that the issues of whether Southern Pacific failed to provide Martin Brothers with cars upon reasonable request, in violation of Section 1, and subjected Martin Brothers to undue prejudice in violation of Section 3, are questions of law which may be determined by the District Court in a manner different than they were determined by the Commission. For example, at page 29 appellee, after quoting a statement from the brief of appellant Interstate Commerce Commission, alleges:

> "The statement describes the conclusions of the Commission as 'ultimate finding' (p. 5 and 8), thus adopting the device used by the appellant, Southern Pacific Company, of attempting to twist legal conclusions of the Commission into findings of fact."

This doctrine advocated by appellee is erroneous. We know of no decision in which a court has ever held that a particular factual record as made before the Interstate Commerce Commission compelled the Commission to conclude as a matter of law that assailed action of a carrier was unreasonable, in violation of Section 1, or constituted undue prejudice, in violation of Section 3. Nor does appellee cite any such decision. Contrariwise, the United States Supreme Court has consistently held that whether particular rates, regulations or practices are (1) "reasonable" or (2) "unduly prejudicial" are determinations of fact confided by Congress to the exclusive judgment and discretion of

the Interstate Commerce Commission. The sound reason for this principle is that neither Section 1 nor Section 3 contains any definition of what is reasonable or unreasonable or what constitutes an undue prejudice, and the Interstate Commerce Commission is a tribunal created by law and informed by experience to determine these questions. The following quotations illustrate the promulgation and application of the principle and the supporting reason by the Supreme Court.

> "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'. *Illinois Central R. R. Co. v. Interstate Commerce Commission,* 206 U.S. 441, 454."
>
> *Virginian Ry. Co. v. United States* (1926), 272 U.S. 658, 665-666.

> "Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, *as a question of fact,* on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland Ry. Co.,* 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic." (Emphasis supplied.)
>
> *Nashville Ry. v. Tennessee* (1923), 262 U.S. 318, 322.

> "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue', 'unjust', 'unfair', and 'unreason-

able'. And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

United States v. Chicago Heights Trucking Co. (1940), 310 U.S. 344, 352-353.

"Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citing cases]."

Swayne & Hoyt, Ltd. v. United States (1937), 300 U.S. 297, 304.

Consistent with these expressions of principle by the Supreme Court is the following statement of the Court of Appeals for the Tenth Circuit in *Johnston Seed Co. v. United States,* (C.A. 10, 1951), 191 F.2d 228, in which the court upheld a decision of the Interstate Commerce Commission denying an award of reparation on the ground that the identical facts constituted a violation of Section 1 for the future *but not for the past* (p. 231):

"Complaint is made that the findings of the Commission were directly contrary to the evidence, and were arbitrary and capricious. The argument in support of the contention is that the finding that the rates charged on mung beans were not shown to have been unreasonable is contrary to the evidence. In view of the dissimilarity among cases of this kind involving reparation, no good purpose would be served by detailing the evidence at length. *The finding was in the nature of a*

factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission. We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to substitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. The field for exertion of the judicial function is exhausted when it appears that there was rational basis for the intelligent finding or conclusion of the Commission. [Citing cases.]" (Emphasis supplied.)

Notwithstanding its having been so well settled that findings as to whether reasonableness and undue prejudice exist are *factual* questions within the exclusive jurisdiction of a tribunal "informed by experience", appellee in its brief refers repeatedly to "findings" of the District Court and the conclusion of the District Court that Martin Brothers was entitled to damages. For example, appellee at page 22 quotes with approval the following statement by the District Court:

> "I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed or requested by the plaintiff *and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.*" (R. 65) (Emphasis supplied.)

This quotation brings into striking perspective the fact that the District Court made *a determination of its own* that

Martin Brothers made requests, *which were in fact reasonable,* for more cars than it received during the complaint period, upon which determination appellee now relies.

This action of the District Court, regardless of the technical words by which it may be described by appellee in its brief, constitutes nothing other than a weighing of the evidence. The Supreme Court specifically condemned such a weighing of the evidence in a judicial review of Commission decisions as follows in *Manufacturers Ry. Co. v. United States* (1918), 246 U.S. 457, 482:

> "In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I.C.C. 104, 105; 32 I.C.C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. [Cases cited.]"

B. The significance of the Examiner's report

Appellee in its brief repeatedly refers to the Examiner's proposed findings as constituting "findings of fact" and "conclusions" determining the issues presented in its complaint to the Commission; appellee intimates that the Examiner made a judicial determination and that the Commission in turn performed the function of merely reviewing that

determination. But this is not the case. The Examiner in the present case pretended to exercise no judicial powers separate and apart from those of the Commission, and he possessed no such powers. The Examiner in his proposed report made no findings of fact; he merely recommended to the Commission that the Commission should make certain findings of fact.

The very purpose of the Examiner's proposed report is to give the parties the opportunity of pointing out to the Commission (through the presentation of exceptions and oral argument) errors in the recommendation of its subordinate employee, the Examiner—this process providing a maximum guaranty of due process.[3] And in the present case, in which the Examiner recommended that the Commission *should find* that Southern Pacific had failed in its duties under Section 1 and *should find* that Martin Brothers had been damaged and was entitled to reparation, Southern Pacific submitted extensive exceptions and presented oral argument before the individual commissioners in Washington, in which it demonstrated, for reasons of fact, law and policy, that the Examiner was wrong in his recommendations (R. 656). It was only after those presentations that Commission action was taken: the issuance of the report of Division 3 by a vote of 3 to 0, which represented the ultimate findings of the Commission, and the issuance of the Commission's order dismissing the complaint; and the action of the entire Commission in denying Martin Brothers' petition for reconsideration by a vote of 10 to 0.

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3. The Examiner's report, although provided for in the Comsion's General Rules of Practice and the Administrative Procedure Act, is not mandatory in all cases. *Kenny v. United States* (U.S.D.C., D.N.J., 1952), 103 F. Supp. 971, 977; 5 U.S.C., Sec. 1007(a).

That our concept of the Examiner's proposed report is correct is evidenced by the following holding of the United States Supreme Court in *Radio Commn. v. Nelson Bros. Co.* (1933), 289 U.S. 266, 285-286:

> "Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."

While this holding of the court pertained to action of the Federal Radio Commission, the same principle has been recognized with respect to the Interstate Commerce Commission. *Inter-City Transportation Co. v. United States* (U.S.D.C., D.N.J., 1948), 89 F. Supp. 441. In that case a party assailed a decision of the Interstate Commerce Commission which was contrary to the recommended decision of the hearing examiner, and the court cited *Radio Commn. v. Nelson Bros. Co.* in support of its following holding (p. 445):

> "it is the responsibility of the Commission and * * * the Commission has the duty in a proper case of disagreeing with a joint board or one of its own examiners, without any attachment of legal significance thereto."

See, also, *National Labor Relations Bd. v. Tex-O-Kan F. Mills Co.* (C.A. 5, 1941), 122 F.2d 433, 437; 42 *Am. Jur.*, Sec. 145.

II.

IT IS UNDISPUTED AND CONCEDED BY ALL PARTIES THAT THE COMPLAINT PERIOD WAS A TIME OF GENERAL CAR SHORTAGE FOR WHICH SOUTHERN PACIFIC WAS NOT LEGALLY RESPONSIBLE

Many of the arguments presented in appellee's brief[4] are answered by the fact, undisputed and conceded by all parties, that the period from January 1 to September 30, 1947, to which appellee's complaint before the Commission was directed, was a period of general freight-car shortage, for which Southern Pacific was not responsible. Indeed, the original complaint of Martin Brothers, as filed with the Commission, specifically stated that during this period there was "a general shortage of box cars" (R. 78). And the Commission in its report stated:

> "After the close of World War II, the nation as a whole experienced a great industrial development, and during 1947 the nation's railroads experienced, for the first time since 1920, except in the war period, an average daily shortage of cars. * * * During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.
>
> "In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest prod-

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4. For example, appellee states at page 22:

"The next matter for consideration is whether during the complaint period Southern Pacific supplied to Martin *an adequate supply of box cars* for transportation of Martin's products in interstate commerce." (Emphasis supplied.)

ucts traffic. * * * The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.

"Another factor affecting the defendant's car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and postwar periods it exerted extensive efforts to conserve and increase its facilities. *On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint.*" (Emphasis supplied.) (R. 116-118)

The identical statements were originally made by the Examiner in his proposed report, and yet no exceptions or objections to these statements were ever registered by Martin Brothers, either in its exceptions before the Commission, in its petition for reconsideration before the Commission, or in the proceedings before the District Court. And the District Court in its opinion accepts the italicized statement in the above quotation, appellee even conceding in its brief (p. 44):

"The next conclusion of the Commission is that during 1947 there was in general a shortage of freight cars, and the Court commented that the evidence upon which this conclusion was based supported the conclusion."

During this car shortage period Southern Pacific did everything possible to insure a distribution to each of the

hundreds of shippers on its lines in Oregon of *a fair share* of the limited car supply available, and during the nine-month complaint period actually furnished Martin Brothers some 565 cars (R. 748-759).

It is to be expected that any method of distribution of a rail carrier's available car supply during a car-shortage period would result in the carrier receiving continual complaints from shippers that they were not receiving sufficient cars. And the record shows that during the complaint period Southern Pacific received thousands of such complaints. Witness F. C. Nelson, Freight Traffic Manager for Southern Pacific at Portland, testified (R. 616):

> "Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?
>
> A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.
>
> Q. What was the general nature of those complaints?
>
> A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem,

Eugene, Medford, were also receiving complaints in countless numbers."

Yet during such a general period of car shortage the conduct of Martin Brothers was not of a kind to aid in mitigating the difficulties confronting a carrier and its shippers. Martin Brothers made general and conflicting statements as to its requirements: it inexplicably refrained from making specific requests for the additional cars now claimed to have been required through the use of car orders, although admonished to do so, and it cancelled specific car orders and failed to use promptly the cars which were supplied to it. All of these facts were shown in the record before the Commission and are developed in our opening brief. These facts certainly constitute "substantial evidence" to support the Commission's ultimate findings that Martin Brothers failed to establish that Southern Pacific "engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the Act, in furnishing or not furnishing cars" or subjected Martin Brothers "to any undue prejudice in violation of Section 3."

III.

APPELLEE'S CONTENTION THAT MARTIN BROTHERS, AS A MATTER OF LAW, MADE REASONABLE REQUESTS FOR MORE CARS THAN IT WAS FURNISHED DURING THE COMPLAINT PERIOD, LACKS MERIT

At pages 16 to 22 of its brief, appellee advances the contention that certain acts of Martin Brothers constituted "reasonable" requests, *as a matter of law,* for more cars than it was furnished during the complaint period and are such as to have compelled the Commission to conclude that Southern Pacific violated Sections 1 and 3 of the Interstate

Commerce Act as alleged. Our reply to this contention of appellee is (1) that the determination as to whether requests for cars are or are not "reasonable" is not a question of law but is rather a question of fact (see authorities cited *supra*, pp. 5-7), and (2) that the record contains substantial evidence that Martin Brothers, as a matter of fact, made no "reasonable" requests for the furnishing of more cars than it actually received during the nine-month complaint period. The existence of this substantial evidence was demonstrated in our opening brief by reference to six criteria of a "reasonable" request, all of which established that, to be reasonable, requests for cars by Martin Brothers should have been sufficiently specific to reveal to Southern Pacific the number and type of cars desired on a particular day. A list of these six criteria, with such discussion as appears necessary to meet criticisms of the criteria, presented by appellee in its brief, follows:

(1) *The general practice followed by shippers in ordering cars, and by Southern Pacific in supplying cars.*

It was not the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. During the complaint period the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only upon receiving an "order" for the placing of a definite number and type of cars on a particular day. Martin Brothers, in its own exhibits, showed that six other Oregon lumber shippers as well as Martin Brothers itself received only cars for which they had placed specific car

orders (R. 704-759). It was the practice of shippers to place their specific day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590).[5]

(2) *The practice followed by Martin Brothers in ordering cars during the complaint period.*

Martin Brothers followed the same general practice in ordering the 565 cars which it received during the complaint period as did other shippers. Yet appellee states, at page 34 of its brief, that cars were furnished to Martin Brothers during the complaint period "without any reference whatsoever to the so-called specific order forms". This contention is completely answered by complainant's own Exhibit No. 8 (R. 748), prepared and presented by Martin Brothers' witness Forrest (R. 312). In that exhibit Martin Brothers shows that the cars it did receive during the complaint period were received pursuant to the specific orders which it placed, either in writing or orally by telephone. To illustrate, the following is a reproduction of the first five lines of page 1 of Exhibit No. 8 (R. 748):

5. This general practice followed by other shippers in ordering cars and by Southern Pacific in supplying cars to them, in addition to providing a persuasive criterion of a "reasonable request", reveals conclusively the absence of any undue prejudice in violation of Section 3, as alleged by Martin Brothers. Since Southern Pacific *furnished other shippers no more cars than those for which they placed specific car orders,* and furnished Martin Brothers with all the cars for which they placed specific car orders during the complaint period, other shippers received no more favorable treatment than did Martin Brothers.

No. of Cars Ordered	Date Ordered	Date Wanted	Cars Received		
			No.	Date	
1	1/2	1/4	1	1/4	Signed
2	1/2	1/4	2	1/4	Signed
3	1/2	1/4	3	1/4	Signed
2	1/2	1/6	2	1/6	Signed
1	1/2	1/6	1	1/6	Signed

The balance of the exhibit is of the same character.

In its brief, appellee quotes certain testimony by witness Bogan as indicating that Martin Brothers did not place specific car orders until after it had determined what cars would be available (p. 34). Any such indication is in direct conflict with the showing made by appellee in its own Exhibit No. 8. Appellee there shows that it generally placed specific orders for cars two or more days prior to the time it "wanted" the cars (and two or more days prior to the time the cars were actually received). Moreover, immediately preceding the excerpt from the testimony of witness Bogan quoted by appellee, Mr. Bogan testified (R. 638):

> "Q. [By Mr. Shafer] Did you know when you got the orders [from Martin Brothers' employee Stapleton] what cars you would give him?
>
> A. When I got the order from Stapleton?
>
> Q. Yes.
>
> A. No. I wouldn't know that until, as a rule, until the train gets in that would have the cars."

At page 35 of its brief, appellee argues that Southern Pacific's witness Robinson testified that he "allocated" cars ordered to cars actually furnished "after the complaint in this matter had been filed with the Commission", and quotes from certain testimony presented by Mr. Robinson at page 574 of the record. The allocation of cars there referred to

by Mr. Robinson was of refrigerator cars to box cars as authorized by I.C.C. Service Order 558 (Ex. No. 34; R. 798) and was designed merely to show that the cars actually furnished constituted a complete fulfillment of the individual car orders placed by Martin Brothers.

(3) *The enforcement of car demurrage rules.*

See pages 19 to 21 of our opening brief.

(4) *The practical factors of car distribution.*

See pages 21 to 24 of our opening brief.

(5) *Previous decisions of the Interstate Commerce Commission.*

Previous decisions of the Commission in *Woolley Co. v. Southern Ry. Co.* (1925), 96 I.C.C. 161, *Winter's Metallic Paint Co. v. Chicago, M., St. P. & P. Ry. Co.* (1923), 87 I.C.C. 113, *Sample v. Atchison, T. & S. F. Ry. Co.* (1928), 139 I.C.C. 324, and *Victor-American Fuel Co. v. Denver & S. L. R. Co.* (1926), 115 I.C.C. 169, are discussed in detail at pages 30 to 33 of our opening brief.

(6) *Previous decisions of the courts.*

Previous decisions of courts in *Koepp v. New Orleans G. N. R. Co.* (1926), 162 La. 487, 110 So. 729, *Simmons v. Seaboard Air Line Ry.* (1909), 133 Ga. 635, 66 S.E. 783, and *Di Giorgio Importing & S. Co. v. Pennsylvania R. Co.* (1906), 104 Md. 693, 65 Atl. 425, are discussed in detail at pages 25 to 29 of our opening brief.

When measured by these six criteria, it is readily apparent that the evidence set forth by appellee in the six subparagraphs at pages 16 to 20 of its brief, as allegedly

constituting "reasonable" requests for additional cars, were not such, either in law or in fact. None of the conduct there set forth constituted specific day-to-day requests for a definite number and type of cars on a particular day, as is required by the six criteria of a "reasonable" request. This is demonstrated at pages 34 to 37 of our opening brief.

IV.

APPELLEE'S OWN EVIDENCE BEFORE THE COMMISSION SHOWED THAT IT CANCELLED CAR ORDERS DURING THE COMPLAINT PERIOD

In our opening brief (pp. 50-51) we pointed out that the record shows that Martin Brothers cancelled certain of the specific car orders placed by it during the complaint period. Appellee answers this contention in its brief (p. 45) by stating: "There is no evidence in the record that Martin at any time cancelled any car order * * *." But this bland statement cannot erase from the record the showing presented in Martin Brothers own Exhibit No. 8 (R. 748-759), prepared and presented by Martin Brothers' witness Forrest (R. 315). That showing, as taken literally from the face of that Exhibit No. 8 is the following:

Order of Feb. 19, 1947, for 3 cars wanted Feb. 22, 1947, "cancelled"
Order of Feb. 26, 1947, for 2 cars wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Apr. 14, 1947, for 2 cars wanted Apr. 16, 1947, "cancelled for one car"
Order of Apr. 14, 1947, for 1 car wanted Apr. 17, 1947, "cancelled"
Order of June 30, 1947, for 1 car wanted June 30, 1947, "cancelled"
Order of July 2, 1947, for 1 car wanted July 7, 1947, "cancelled"
Order of July 11, 1947, for 1 car wanted July 16, 1947, "cancelled"

Nor did witness Forrest, in presenting Exhibit No. 8, attempt to either qualify or explain the cancellations so shown in his exhibit.

Appellee in its brief also attempts to refute this clear evidence of cancellation of orders by referring to the testimony of witness Martin that "if they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through." This testimony of Mr. Martin concerns an alleged *rejection* of cars actually received and does not pertain to the *cancellation* of specific orders for cars which had not yet been received, as shown in Exhibit No. 8. Certainly, if appellee *rejected* a car, as alleged by Mr. Martin, there would have been no rational reason for it to *cancel* its outstanding order for a needed car.

V.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT MARTIN BROTHERS HELD BOX CARS, AS WELL AS OTHER TYPES OF CARS, FOR THREE OR MORE DAYS AFTER THEY HAD BEEN PLACED ON ITS SPUR TRACK AT OAKLAND

In our opening brief we pointed out that the record contained uncontradicted showings that during the complaint period Martin Brothers had engaged in the extensive practice of holding box cars, as well as other types of cars, for three or more days (excluding Sundays and holidays) after they had been placed on its spur track (see table at top of page 48 of our opening brief). This evidence was expressly referred to by the Commission in its report (R. 120-121), and the Commission there stated:

> "Such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

The sole reply presented by appellee to this uncontradicted showing of record, recognized by the Commission as

"relevant", is to refer to the "analysis" of this evidence by the District Court in its opinion. Not only does this analysis by the District Court represent a definite weighing of the evidence, contrary to the well established principles as to the power of the courts in reviewing decisions of the Interstate Commerce Commission (cited *supra,* p. 8), but, as we pointed out in our opening brief (p. 49), certain of the statements there made by the Court are directly contrary to and unsupported by the evidence of record. There is nothing in the Court's analysis to detract from the showing made concerning the holding of cars, which constitutes substantial evidence that Martin Brothers at certain times during the complaint period would have been unable to load cars in addition to those which were furnished during the complaint period.

CONCLUSION

Appellee, in the conclusion to its brief, states:

> "This is essentially not a difficult case. The facts are relatively simple and undisputed."

With this statement of appellee we fully agree. The only question to be determined by this Court is whether the record made before the Commission contains substantial evidence to support the Commission's findings of ultimate fact that Martin Brothers failed to establish that Southern Pacific "during the complaint period engaged in any unreasonable or otherwise unlawful practice as alleged in violation of Section 1 of the Act in furnishing or not furnishing cars" or subjected Martin Brothers "to any undue prejudice in violation of Section 3." We submit that the record definitely

does contain such substantial evidence and that, therefore, the judgment of the District Court should be reversed.

Respectfully submitted,

James C. Dezendorf,
George B. Campbell,
James E. Lyons,
Charles W. Burkett, Jr.,
Attorneys for Appellant
Southern Pacific Company

San Francisco, California,
June 4, 1954.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon counsel for appellee by mailing, by first-class mail, three copies thereof addressed to Messrs. Irving Rand and Donald A. Schafer, Public Service Building, Portland 4, Oregon, and one copy thereof addressed to Mr. George L. Quinn, Bowen Building, Washington 5, D. C.

Dated at San Francisco, California, this 4th day of June, 1954.

Charles W. Burkett, Jr.

Of Counsel for Appellant
Southern Pacific Company